EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RICHARD G. TATUM, individually and on behalf of a class of all other persons similarly situated,	)	
Plaintiff,	)	**Civil Action No. 1:02 CV 00373**
v.	)	
R.J. REYNOLDS TOBACCO COMPANY, et al.	)	**PLAINTIFF'S OBJECTION TO DEFENDANTS' SUGGESTION OF SUBSEQUENTLY DECIDED AUTHORITY**
Defendants.	)	

Plaintiff objects to Defendants' Suggestion of Subsequently Decided Authority, Dkt. #394, which they claim supports their Opposition to Plaintiff's Motion to Amend Under Fed. R. Civ. P. 15(b)(2). The suggested authority is inapposite, because none of the cited cases involve leave to amend under Rule 15(b)(2) in a situation similar to here: where Plaintiff has sought leave to amend the pleadings with additional facts in support of his originally pleaded claim, based on evidence introduced at trial by Defendants without objection, and where no additional discovery or evidence would be required.[1]

[1] Plaintiff has also stated that the Court need not reach Plaintiff's proposed amendment if it finds that the November Amendment would not have been attempted had Defendants not made the imprudent decisions to divest the Nabisco funds in March and October 1999. *See* Dkt. #365 (Memorandum re: Legal Effect of Invalid Plan Amendment); Dkt. #370 (Plaintiff's Reply in Support of Plaintiff's Motion to Amend Under Fed. R. Civ. P. 15(b)(2).

1. *Dank v. Shinseki*, No. 09-1009, 2010 WL 1500524 (4th Cir. Apr. 15, 2010), an unpublished decision, upheld denial of leave to amend under Federal Rule of Civil Procedure 15(b)*(1)*, not Rule 15(b)*(2)*, as here. *Id.* at *3-*4. Also unlike here, plaintiff sought to amend the pleadings with a new legal claim involving a different standard of proof than the pleaded claim. *Id*. Thus, further unlike here, "[t]he proof required to defend against the new claim would be of an entirely different character than the proof which the defendant had been led to believe would be necessary." *Id.* at *4.

2. *Halpern v. Wake Forest University Health Sciences*, 1:09-CV-474, 2010 WL 2650842, at *10 (M.D.N.C. July 1, 2010) (Auld, Mag. J.), held that there was no good cause under Rule 16(b) for a plaintiff to amend his complaint with 32 new paragraphs stating three new claims. *Id.* at *2. Plaintiff here does not seek to add any new legal claims.

3. *Trim Fit, LLC v. Dickey*, 607 F.3d 528 (8th Cir. 2010), upheld denial of leave to amend under Rule 15(a)(1)(B) and 15(a)(2), not Rule 15(b)(2), where the court concluded that additional evidence would have been required to establish the new legal claim sought to be added. *Id.* at 531-32. Plaintiff here contends no additional evidence is required to establish the facts sought to be added to his complaint. *See* Dkt. #365 at 2-3.

4. *Kansas City Southern Railroad Co. v. Borrowman*, No. 09-3094, 2010 WL 2178699 (C.D. Ill. May 28, 2010), denied leave to amend where the plaintiff sought to add a new legal claim, unlike here, and there was no evidence introduced in support of that claim. *See id.*, at *2-*3 (denying leave to amend to challenge liability for additional

tax years, where there was no evidence introduced relating to the assessment of taxes other than for one year, as each year of tax liability is a "separate cause of action").

5. *McElgunn v. Cuna Mutual Insurance Society*, --- F. Supp. 2d. ---, 2010 WL 1141519 (D.S.D. Mar. 22, 2010), similarly found no implied consent to add an unpleaded affirmative defense, where evidence had been introduced relevant both to that defense and to the pleaded claim. *Id.* at *12. Plaintiff does not seek to add a new defense.

Dated: July 14, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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